

Members

Sen. R. Michael Young, Chairperson  
Sen. Luke Kenley  
Sen. Lindel Hume  
Sen. Richard Young  
Rep. John Frenz  
Rep. Jerry Denbo  
Rep. Phillip Hinkle  
Rep. Michael Murphy



## ADMINISTRATIVE RULES OVERSIGHT COMMITTEE

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### MEETING MINUTES<sup>1</sup>

**Meeting Date:** August 19, 2004  
**Meeting Time:** 10:30 A.M.  
**Meeting Place:** State House, 200 W. Washington  
St., Room 233  
**Meeting City:** Indianapolis, Indiana  
**Meeting Number:** 1

**Members Present:** Sen. R. Michael Young, Chairperson; Sen. Richard Young; Rep. John Frenz; Rep. Jerry Denbo; Rep. Phillip Hinkle.

**Members Absent:** Sen. Luke Kenley; Sen. Lindel Hume; Rep. Michael Murphy.

Senator R. Michael Young, Chairman of the Committee, convened the meeting at 10:40 a.m. Senator Young indicated that the meeting would consist of a progress report on the implementation of SEA 493 (2003),<sup>2</sup> concerning home and community based services for elderly and disabled individuals. He then invited Annette Biesecker of the Family and Social Services Administration (FSSA) to address the Committee.

#### (1) FSSA Report

Annette Biesecker, Legislative Director for FSSA, thanked the Committee and explained

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<sup>1</sup> Exhibits and other materials referenced in these minutes can be inspected and copied in the Legislative Information Center in Room 230 of the State House in Indianapolis, Indiana. Requests for copies may be mailed to the Legislative Information Center, Legislative Services Agency, 200 West Washington Street, Indianapolis, IN 46204-2789. A fee of \$0.15 per page and mailing costs will be charged for copies. These minutes are also available on the Internet at the General Assembly homepage. The URL address of the General Assembly homepage is <http://www.ai.org/legislative/>. No fee is charged for viewing, downloading, or printing minutes from the Internet.

<sup>2</sup>See Exhibit 1.

that SEA 493 (2003) was meant to expand the provision of health care services to the elderly and disabled in their homes and communities, instead of in nursing facilities. She then directed the Committee's attention to the SEA 493 Implementation Grid<sup>3</sup> prepared by FSSA. Ms. Biesecker noted that the grid provides a status report on FSSA's progress in implementing each major section of the Act. Before highlighting the agency's efforts with respect to various requirements of the Act, Ms. Biesecker reminded the Committee that IC 12-10-11.5-2 provides that the cost of providing long term care under the Act, through home and community based services (HCBS), may not exceed the total amount of available state and federal funds for those services. Accordingly, FSSA is limited to increasing the availability of HCBS within the current fiscal constraints of state resources. As evidence of FSSA's commitment to implementing SEA 493, Ms. Biesecker pointed to the Office of Medicaid Policy and Planning's (OMPP's) decision to send a letter notifying every Indiana nursing home resident of the available alternatives to nursing home care.

Pointing to the Act's eligibility requirements for HCBS, Ms. Biesecker explained that an individual qualifies for HCBS if he or she: (1) participates in, or is eligible for, the Community and Home Options to Institutional Care for the Elderly and Disabled program (CHOICE); or (2) meets the general eligibility standards for services under a home and community based Medicaid waiver. However, while the income limitation under a Medicaid waiver is currently 100% or less of the federal Supplemental Security Income level, the Act increases the income limitation to an income of not more than 300% of the Supplemental Security Income level. According to Ms. Biesecker, this change in income level represents a major expansion of eligibility under the program. She reported that FSSA engaged the Lewin Group in December 2003 to analyze the fiscal impact of SEA 493. She indicated that the final report, expected in ten to twelve weeks, would include the fiscal impact to the State of expanding eligibility for HCBS, along with any cost savings to be realized by moving people from institutional care to HCBS.

Ms. Biesecker next turned to the long term care services that SEA 493 requires to be made available to eligible individuals. The Act requires that an eligible individual have access to any HCBS that is available through the CHOICE program or any state Medicaid waiver. Ms. Biesecker explained that the Aged and Disabled waiver is the Medicaid waiver used in situations involving long term care through HCBS. According to Ms. Biesecker, the services available under the Aged and Disabled waiver are identical to the services provided under the CHOICE program, with the exception of "other services" provided under CHOICE, which is not a service category recognized by the Centers for Medicare & Medicaid Services (CMS).

Highlighting the provisions in SEA 493 concerning respite care services, Ms. Biesecker explained that the Act requires FSSA's Division of Disability, Aging, and Rehabilitative Services (DDARS) to provide standards for the training of, and promotion of best practices for, HCBS providers. Ms. Biesecker reported that the final version of the provider standards rule was approved by the Family and Social Services Committee on August 10, 2004.<sup>4</sup> A public hearing on the rule was held on June 22, 2004, and comments were allowed for submission through June 29, 2004. Currently under review by the Attorney General, the rule could receive final approval by the Governor as early as October 15, 2004.

Ms. Biesecker next focused on the implementation responsibilities of the OMPP under the

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<sup>3</sup>See Exhibit 2.

<sup>4</sup>See Exhibit 3.

Act. She reported that the OMPP met the deadline of October 1, 2003, to apply to CMS to amend the Aged and Disabled waiver to include any services offered under the CHOICE program. The OMPP also met the September 1, 2003, deadline to: (1) apply to CMS to amend the waiver to include spousal impoverishment protections at least equal to those available to individuals residing in licensed health facilities; and (2) seek approval from CMS for 20,000 additional waiver slots at no additional cost to the State. While the spousal impoverishment protection sought was approved by CMS in February 2003, the CMS requested additional information from OMPP with respect to the 20,000 additional waivers requested. Ms. Biesecker reported that the OMPP's response to the request is under development. Because of the restriction that the cost of providing HCBS under SEA 493 may not exceed the amount of available state and federal funds, FSSA cannot ask for more slots than it has the resources to fill. Accordingly, OMPP is awaiting the Lewin Group's report to assist it in assessing capacity before it submits its final response to CMS.

With respect to the July 1, 2004, deadline by which FSSA must make self-directed care options available under both the CHOICE program and the Medicaid waiver, Ms. Biesecker informed the committee that the CHOICE program has included a self-directed care option since 2001. Approximately 140 people currently use the option, and DDARS plans to expand self-directed attendant care by making full use of the Community Personal Assistance Services and Supports grant (C-PASS) received from CMS for the 2003 fiscal year. However, Ms. Biesecker noted that self-directed care involves complicated employment issues, because the HCBS recipient technically serves as the employer of record for the attendant hired. Because of the complexity of income tax withholding and other issues, FSSA filed a notice of intent to adopt a rule concerning the hiring of fiscal agents. Under the proposal, fiscal agents would act as financial intermediaries between the person receiving services and the attendant hired to provide them.

Before concluding her remarks, Ms. Biesecker directed the Committee's attention to a letter from FSSA Secretary Cheryl Sullivan to Marilyn Schultz, Director of the State Budget Agency.<sup>5</sup> As required by SEA 493, the letter reports statistics on the number of individuals: (1) currently receiving and on a waiting list for HCBS under the CHOICE program; (2) currently receiving and on a waiting list for HCBS under a Medicaid waiver; (3) receiving assisted living services or adult foster care under a Medicaid waiver; and (4) residing in licensed health facilities and potentially qualifying for service by HCBS. Finally, Ms. Biesecker reported that, as required by the Act, OMPP has implemented a policy that allows Medicaid funds to follow an individual who transfers from institutional care to Medicaid home and community based care. According to Ms. Biesecker, funding for Aged and Disabled waiver slots comes from money budgeted for nursing facilities.

Ms. Biesecker then invited questions from the Committee. In response to a question from the Chairman, Ms. Biesecker promised to find out whether the State must use all 20,000 additional waiver slots if they are granted by CMS. She also indicated that she would report back to the Committee on the cost of the fiscal impact study conducted by the Lewin Group.<sup>6</sup>

## **(2) Testimony from the Indiana Home Care Task Force <sup>7</sup>**

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<sup>5</sup>See Exhibit 4.

<sup>6</sup>See Exhibit 5.

<sup>7</sup>See Exhibit 6.

Senator Young then invited John Cardwell, Chairman of the Indiana Home Care Task Force, to address the Committee. Mr. Cardwell introduced his organization as a voluntary alliance of over 70 organizations representing consumers, senior citizens, persons with disabilities, and HCBS providers. Explaining that SEA 493 had been modeled after a successful law adopted by the State of Washington, Mr. Cardwell reminded the Committee that consensus among many stakeholders on the value of HCBS had led to the adoption of Indiana's law in 2003. He then expressed his frustration with the status of the law's implementation and with the HCBS rules adopted by DDARS.

Mr. Cardwell suggested that the rules establishing standards for HCBS providers<sup>8</sup> adopted by DDARS ignore the provisions of SEA 493. As evidence that the rules do not implement the policies of SEA 493, Mr. Cardwell pointed to the lack of any reference in the rules to the Indiana Code cites contained in SEA 493. Suggesting that DDARS had promulgated the rules without considering input from the CHOICE Board and from all interested parties, Mr. Cardwell urged the Committee to recommend the withdrawal of the HCBS provider rules.

Finally, Mr. Cardwell noted that other states with similar programs had been able to determine the costs of implementation. Questioning FSSA's need to hire an outside consultant to estimate the costs of HCBS, Mr. Cardwell suggested that the protracted fiscal analysis has delayed implementation of SEA 493. As to whether FSSA would have to use all 20,000 additional Medicaid waivers if granted by CMS, Mr. Cardwell asserted that FSSA would not have to use all of the slots. He questioned FSSA's delay in responding to CMS' request for additional information while it awaits the Lewin Group's fiscal analysis.

### **(3) Testimony from the Indiana Association for Home and Hospice Care**

Following Mr. Cardwell's remarks, John Stallings, Executive Director of the Indiana Association for Home and Hospice Care, addressed the Committee. Explaining that his organization is a trade association representing 170 providers of long term care, Mr. Stallings claimed that a "rush to regulate" home health care providers has created disincentives for providers to participate in HCBS programs. According to Mr. Stallings, home health care providers are subject to numerous audits and surveys which result in lost hours and productivity. Financial disincentives also have made providers reluctant to participate in the State's HCBS programs. As an example, Mr. Stallings explained that under the traditional Medicaid program, a provider would be paid \$52 for a two-hour home visit, versus \$32 for a similar visit under an HCBS program.

In closing, Mr. Stallings echoed Mr. Cardwell's dissatisfaction with the HCBS provider rules. He complained that DDARS had not sought input from HCBS providers, and that the comments submitted were not considered in the rulemaking process.

### **(4) Testimony from CICOA Aging & In-Home Solutions**

The Chairman next asked for testimony from Duane Etienne, President and CEO of CICOA Aging & In-Home Solutions. As central Indiana's area agency on aging, CICOA funds home health aides, attendant care, adult day care, respite services, transportation, and other services for the aged and disabled in eight counties. After introducing himself,

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<sup>8</sup>See Exhibit 3.

Mr. Etienne distributed a table<sup>9</sup> illustrating the potential savings to the State during the 2004 fiscal year if home based care, instead of nursing home care, had been provided to the 539 nursing home residents identified as appropriate for home care in CICOA's service area. According to Mr. Etienne, caring for those 539 individuals in nursing homes costs the State an additional \$8.35 million over what it would have cost to serve the individuals through HCBS. Mr. Etienne noted that the \$8.35 million that could have been saved in CICOA's service area represents about 20% of the total savings that could have been realized throughout Indiana through the use of HCBS.

Mr. Etienne then directed the Committee's attention to the FSSA progress report submitted to the Health Finance Commission as required by SEA 449 (2004).<sup>10</sup> Addressing a question raised earlier by Representative Hinkle about the \$3 million in CHOICE funding reported as unspent by the State's area agencies on aging during State Fiscal Year 2003, Mr. Etienne indicated that his agency was responsible for about \$1 million of that amount. He explained that 30 of the agency's 1,100 CHOICE clients are subject to a cost share formula because their income is 150% or more of the federal income poverty level. Because of the cost share requirements, part of the cost of services under CHOICE are paid by the clients themselves, resulting in a portion of the allocated CHOICE funding not being used by the agency.

Finally, Mr. Etienne expressed his belief that the money saved through the use of conversion waivers, which allow people to transfer from nursing homes to HCBS, should be used by FSSA to implement the requirements of SEA 493.

#### **(6) Testimony from AARP Indiana**

The Committee next heard from June Lyle, Associate State Director for Public Policy for AARP Indiana. Ms. Lyle stated that she would focus on what she considered to be five key provisions of SEA 493. First, she stressed the importance of the Act's expansion of eligibility for HCBS by increasing the income limitation for qualifying individuals to an income of not more than 300% of the Supplemental Security Income level. She noted that with more people eligible for HCBS, fewer would need to rely on the more expensive option of a nursing home. According to Ms. Lyle, the State should not need to hire an outside consultant to determine that it will save money by expanding eligibility for HCBS.

Second, Ms. Lyle emphasized that SEA 493 requires FSSA to provide an array of long term care services, including adult foster care, assisted living, and adult day care. As evidence that these services are either underutilized or unavailable, Ms. Lyle stated that only 60 people receive assisted living services through a Medicaid waiver, and that adult day care is available in just 26 of 92 counties.

Third, Ms. Lyle argued that FSSA has failed to make self-directed care options available under the Aged and Disabled Medicaid waiver, as required by SEA 493. She noted that while 140 people use self-directed attendant care under CHOICE, FSSA has failed to make use of the federal funds it received through the Community Personal Assistance Services and Supports grant (C-PASS) to expand self-directed care under the Aged and Disabled waiver.

Fourth, Ms. Lyle suggested that the OMPP has hurt its own efforts to obtain approval from

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<sup>9</sup>See Exhibit 7.

<sup>10</sup>See Exhibit 8.

CMS for the 20,000 additional Medicaid waiver slots. In support of this contention, she claimed that in its letter to CMS requesting the additional slots, the OMPP had indicated that state funding was not available for the slots. Ms. Lyle then suggested that FSSA has applied too broad an interpretation to the section in SEA 493 providing that the cost of providing HCBS may not exceed the total amount of available state and federal funds. Ms. Lyle claimed that the restriction applies only to services provided under IC 12-10-11.5 (as added by SEA 493) and does not apply to services provided under other provisions of the Act, such as the provisions requiring FSSA to request additional waiver slots and to make self-directed care options available.

At this point, the Chairman interjected to ask Ms. Biesecker whether FSSA is required under the terms of the C-PASS grant and other sources of federal funding to identify state funding sources for the services to be provided, or whether the decision to identify state funding is a matter of FSSA internal policy. Ms. Biesecker replied that she was unsure of the basis for the decision but would find out and provide the Committee with an answer.<sup>11</sup> The Chairman also asked Ms. Biesecker to provide Committee members a copy of the OMPP's letter requesting the 20,000 additional waiver slots. Ms. Biesecker agreed to do so.<sup>12</sup> However, she noted that the letter stated that funding is unavailable because, at this point, the amount of savings that could result from using the waivers is speculative. Ms. Biesecker suggested that it would be irresponsible for OMPP to represent that it could provide the required one-third of the funding for the slots, when the fiscal impact of moving individuals from institutions to HCBS has not been determined.

Turning to what AARP Indiana considers another important provision of SEA 493, Ms. Lyle pointed to the requirement that OMPP implement a policy allowing Medicaid funding to follow an individual who transfers from institutional care to HCBS. According to Ms. Lyle, the State's area agencies on aging have complained that they are not receiving full funding to move people to HCBS.

In concluding her remarks, Ms. Lyle noted that while the HCBS provider rules<sup>13</sup> adopted by DDARS were not in response to SEA 493, they would nevertheless affect the implementation of the Act. Expressing her concerns about the rules, she recommended that the Committee ask DDARS to withdraw the rules.

## **(7) Testimony from United Senior Action**

Finally, the Committee heard from Paul Severance, Executive Director of United Senior Action of Indiana. After distributing a "report card"<sup>14</sup> on Indiana's long term care services, Mr. Severance expressed frustration that FSSA had not yet changed the income eligibility standard for the HCBS program from 100% to 300% of the federal Supplemental Security Income level. He noted that FSSA had previously promised that the eligibility standard would be changed when 1,000 people had been transferred from nursing homes. However, despite the goal of 1,000 transfers having been achieved, the only action FSSA has taken has been to commission a study of the fiscal impact of changing the eligibility standard.

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<sup>11</sup>See Exhibit 5.

<sup>12</sup>See Exhibit 9.

<sup>13</sup>See Exhibit 3.

<sup>14</sup>See Exhibit 10.

Mr. Severance also criticized FSSA for not making efforts to identify nursing home residents who could receive care in another setting. He explained that other states send trained social service workers to nursing homes to explain alternative care options to residents and to provide them with assistance in making a move. As an example of one such program, he noted that Oregon moved over 10,000 people out of nursing homes in the 1980s.

Before closing, Mr. Severance suggested that FSSA had failed to implement a law passed in 2001 by failing to apply for federal approval for adult foster care. As a result, no Indiana residents are receiving adult foster care. According to Mr. Severance, the same 2001 law also required FSSA to apply to CMS for approval for an assisted living waiver. He claimed that in its initial waiver application, FSSA had stated that Indiana would serve 2,250 people by 2004. When FSSA later applied for a renewal of the waiver, it requested 450 slots. Mr. Severance claimed that in either case, FSSA has failed to implement the program, with less than 100 people currently receiving assisted living services.

The Chairman then thanked Mr. Severance and the other speakers for their testimony. After scheduling the Committee's second meeting for September 15, 2004, the Chairman adjourned the meeting at 12:30 p.m.